

## COMMENT

### BALLOT ACCESS BEHIND BARS

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#### INTRODUCTION

After Joe Watson was arrested in 2007, he spent two and a half years sitting in a jail cell awaiting trial.<sup>1</sup> During his incarceration, Watson paid attention as Barack Obama campaigned in the 2008 election.<sup>2</sup> Even though Watson was in jail, because he was a U.S. citizen, over eighteen years old, and had never been convicted of a felony, he maintained his right to vote.<sup>3</sup> But, when Watson requested a ballot from guards, they denied his request and simply laughed.<sup>4</sup> “They just ignored me. There was nothing I could do,” Watson said.<sup>5</sup> “I was just denied my right to vote. It was very deflating.”<sup>6</sup>

Watson’s story reflects a troubling phenomenon that occurs throughout the United States: jail policies unconstitutionally inhibit—or outright prevent—eligible voters from participating in elections.<sup>7</sup> Nearly all jailed citizens are merely awaiting trial and not yet convicted of anything, or serving time for nondisfranchising misdemeanor crimes.<sup>8</sup> Therefore, barring age or immigration status restrictions, most of the U.S. jailed population is legally eligible to vote.<sup>9</sup> In fact, the U.S. Supreme Court explicitly affirmed that election policies violate the Equal Protection Clause if such policies: (1)

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1. See Hannah Critchfield, *Only Eight People Voted from Arizona’s Jails in 2018. Will This Election Be Different?*, INTERCEPT (Mar. 16, 2020, 12:20 PM), <https://theintercept.com/2020/03/16/voting-rights-arizona-jails/> [https://perma.cc/W9HU-2U4K].

2. *Id.*

3. *Id.*; see also ARIZ. CONST. art. 7, § 2.

4. Critchfield, *supra* note 1.

5. *Id.*

6. *Id.*

7. See *id.*

8. See Thea Sebastian et al., *Democracy, If You Can Afford It: How Financial Conditions Are Undermining the Right to Vote*, 4 UCLA CRIM. JUST. L. REV. 79, 92 (2020).

9. Jason Asenso, *Most People in Jail Can Vote. Here’s Why Many Don’t*, INJUSTICEWATCH (Oct. 8, 2020), <https://www.injusticewatch.org/news/2020/jailvotingreport/> [https://perma.cc/62P2-67DP]. When I refer to the jailed population in this Comment, I am referring to the part of the jailed population who are otherwise eligible to vote.

arbitrarily disenfranchise people in jail or (2) place an “unconstitutionally onerous burden” on access to the franchise.<sup>10</sup>

Nonetheless, current policies within jails inhibit nearly 745,000<sup>11</sup> voting-eligible citizens from casting a ballot on Election Day.<sup>12</sup> Notably, these policies disproportionately impact people of color and other historically marginalized voters.<sup>13</sup> For example, while Black and Latinx people in the United States comprise 30 percent of the general population, they comprise over 50 percent of the U.S. jail population.<sup>14</sup> Jail-based disenfranchisement policies mirror Jim Crow-era laws—they appear facially neutral, but in practice significantly impede voter participation of specific groups of individuals.<sup>15</sup> In the aftermath of Reconstruction, discrete minority groups faced barriers to the ballot box such as poll taxes, grandfather clauses, and poll intimidation.<sup>16</sup> Today, a discrete group of voting-eligible individuals, a disproportionate number of whom are poor minorities, face similar impediments when they try to vote from jail.<sup>17</sup>

Although incarcerated voters comprise only a small portion of the U.S. electorate, these voters can make a meaningful difference in close elections. In 2016, former president Donald J. Trump won the 2016 presidential contest in Michigan by 10,700 votes; there were 16,600 people detained in Michigan jails during the election.<sup>18</sup> Similarly, President Joseph R. Biden, Jr. won the 2020 presidential contest in Georgia by 12,670 votes;<sup>19</sup> there were approximately 37,456 people detained in Georgia’s jails during the

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10. O’Brien v. Skinner, 414 U.S. 524, 530 (1974).

11. NICOLE D. PORTER, THE SENTENCING PROJECT, VOTING IN JAILS 5 (2020), <https://www.sentencingproject.org/publications/voting-in-jails/> [https://perma.cc/73J2-2UXG] (using data current as of 2017).

12. See generally Dana Paikowsky, Note, *Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829 (2019).

13. *Id.* at 835.

14. RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 15 (2015), [https://www.vera.org/downloads/publications/incarcerations-front-door-report\\_02.pdf](https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf) [https://perma.cc/9SGV-4ARZ].

15. See generally Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002 (2019) (reviewing ELIZABETH GILLESPIE MCRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY* (2018), and JEANNE THEOHARIS, *A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY* (2018)).

16. *Id.* at 1033.

17. See Ginger Jackson-Gleich & S. Todd Yeary, *Eligible, but Excluded: A Guide to Removing the Barriers to Jail Voting*, PRISON POL’Y INITIATIVE, [https://www.prisonpolicy.org/reports/jail\\_voting.html](https://www.prisonpolicy.org/reports/jail_voting.html) [https://perma.cc/YFL4-E2QU] (last visited Apr. 27, 2021) (describing barriers that individuals incarcerated in state and local jails face when attempting to vote).

18. Shawn Mulcahy, *Cuts to USPS Threaten Voting Access for Hundreds of Thousands of Americans in Jails*, GUARDIAN (Sept. 15, 2020, 8:00 AM), <https://www.theguardian.com/us-news/2020/sep/15/usps-cuts-threaten-ballot-access-inmates> [https://perma.cc/SN3T-XGES].

19. *November 3, 2020 General Election: Results*, GA. SEC’Y OF STATE (Nov. 20, 2020, 3:37 PM), <https://results.enr.clarityelections.com/GA/105369/web.264614/#!/summary> [https://perma.cc/C2RN-UZ4L].

election.<sup>20</sup> If Michigan's and Georgia's policies did not inhibit jailed citizens from voting, the states very well may have seen different electoral results.<sup>21</sup>

This Comment seeks to understand the policies that prevent jailed citizens from voting. Part I examines relevant case law to determine the legal standard regarding voting rights behind bars. Then, Part II considers whether modern policies for voting in jails violate that standard. Finally, Part III identifies barriers that may prevent private plaintiffs from successfully litigating unconstitutional disenfranchisement claims and proposes action for the Department of Justice (DOJ) to take, pursuant to existing authority, as the most practical solution to end jail-based disenfranchisement. While jails are notoriously opaque, the DOJ's unparalleled authority to conduct investigations within such facilities makes it the most effective actor to challenge unconstitutional practices. The U.S. government derives its legitimacy from the participation and consent—through voting—of its citizens; it must use its authority to combat jail-based disenfranchisement.<sup>22</sup>

### I. THE RIGHT TO VOTE FROM JAIL

People in jail have a right to vote, and the realities of incarceration should not prevent jailed individuals from exercising that right. Jail-based disenfranchisement occurs when election policies prevent constitutionally eligible jailed citizens from voting.<sup>23</sup>

First, an important note on terminology: although “prison” and “jail” are often used interchangeably as places of incarceration, the two words are not synonymous. “Prisons” hold individuals *convicted* of *serious* crimes who are generally serving sentences of one year or more.<sup>24</sup> In contrast, “jails” house individuals awaiting trial or serving sentences for minor crimes, generally for less than one year.<sup>25</sup> Only 39 percent of jail inmates are serving time for convictions, and all of those convictions are for minor nondisenfranchising crimes.<sup>26</sup> The other 61 percent of jail inmates are awaiting trial and not yet convicted of any crime.<sup>27</sup> These pretrial detainees are often in jail because

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20. VERA INST. OF JUST., INCARCERATION TRENDS IN GEORGIA 1 (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-georgia.pdf> [<https://perma.cc/Q8ZT-K63H>] (displaying the most recent data regarding Georgia's jailed population).

21. Mulcahy, *supra* note 18 (“Imagine the huge impact this election could have when you have this entire class of sectioned-off citizens.”).

22. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

23. See generally Paikowski, *supra* note 12.

24. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 4 n.14 (2011).

25. *Id.*

26. JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 10 (2017), <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf> [<https://perma.cc/8L59-ZSHN>].

27. *Id.*

they cannot afford to pay bail<sup>28</sup> or are on trial for a nonbailable offense.<sup>29</sup> By definition, the United States presumes that the majority of the jail population is innocent, at least until proven guilty.<sup>30</sup>

It is important to note that jails generally do not house people serving time for felony convictions, and this Article does not explore the validity of policies that disenfranchise convicted felons. In the 1974 case *Richardson v. Ramirez*,<sup>31</sup> the Court affirmed that states have the authority to restrict voting rights based on previous felony convictions.<sup>32</sup> As the majority of the people in jail are awaiting trial, not yet convicted, the Court did *not* express any opinion about voting from jail.<sup>33</sup>

On three occasions the Supreme Court held that states must provide people in jail with meaningful access to the ballot box. First, in *McDonald v. Board of Election Commissioners of Chicago*,<sup>34</sup> the Court held that otherwise-eligible people in jail are legally qualified to vote and that housing within a jail cannot bar access to the franchise.<sup>35</sup> Then, in *Goosby v. Osser*,<sup>36</sup> the Court affirmed that a state violates the Constitution when it prevents eligible jailed citizens from accessing the voting franchise.<sup>37</sup>

Lastly, in *O'Brien v. Skinner*,<sup>38</sup> the Court clarified the doctrinal framework to determine whether election policies unconstitutionally disenfranchise people in jail. In *O'Brien*, county officials denied petitioners' request for: (1) establishing a mobile voter registration unit in the jail, (2) transportation to polling places, and (3) permission to register and vote absentee.<sup>39</sup> Ultimately, the Court recognized that New York's election statutes disenfranchised its jailed citizens who were lawfully authorized to vote.<sup>40</sup> Importantly, the Court held that a constitutional injury arises if a state makes it facially impossible for those in jail to vote, or if its policies create the functional equivalent of making voting impossible.<sup>41</sup> Further, even if voting is not necessarily impossible, a constitutional injury arises if those policies

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28. See Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<https://perma.cc/P4SZ-9PHE>].

29. See KANG-BROWN & SUBRAMANIAN, *supra* note 26, at 10. Individual states determine what constitutes a bailable or nonbailable offense. See Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 761 (2011).

30. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

31. 418 U.S. 24 (1974).

32. *Id.* at 56.

33. *Id.*

34. 394 U.S. 802 (1969).

35. *Id.* at 805.

36. 409 U.S. 512 (1973).

37. *Id.* at 518. However, the Court ultimately remanded the case based on a procedural error. *Id.* at 522.

38. 414 U.S. 524 (1974).

39. *Id.* at 527.

40. *Id.* at 530.

41. *Id.*

“operate as a restriction which is ‘so severe as itself to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise.’”<sup>42</sup>

*O’Brien* did not create an extensive framework to determine whether a constitutional violation exists, and only two lower courts have found unconstitutional disenfranchisement within jails. In *Dawson v. Kendrick*,<sup>43</sup> a West Virginia district court held that jail officials “must take steps to facilitate the [jailed plaintiffs’] right to vote as otherwise established” by state law.<sup>44</sup> Then, in *Murphree v. Winter*,<sup>45</sup> a Mississippi district court granted a detainee plaintiff class’s pretrial motion for a preliminary injunction and prohibited the defendant jail officials from denying jailed voters access to an absentee ballot.<sup>46</sup> The court held that the deprivation of the right to vote “outweigh[ed] any threatened harm that the injunction could do to the Defendants.”<sup>47</sup>

## II. MODERN ELECTION PRACTICES

As previously discussed, when Joe Watson attempted to vote from jail in Arizona in 2008, guards laughed in his face.<sup>48</sup> The sad truth is that Watson’s story is not an aberration. Not only are people in jail unaware that they have a right to vote, but jail policies in the United States actively inhibit—or fail to facilitate—voting access behind bars. Specifically, local procedures often prevent or inhibit those people from: (1) registering to vote, (2) being informed about the candidates on Election Day, (3) voting in person, and (4) voting by mail.<sup>49</sup>

One of the most significant barriers to voting from jail is confusion regarding voter eligibility.<sup>50</sup> Election officials often lack sufficient knowledge regarding whether people in jail can vote.<sup>51</sup> For example, in Tennessee, 90 percent of local election officials incorrectly understood state laws regarding voting eligibility for individuals with out-of-state felony convictions.<sup>52</sup> When an official, whose sole job is to administer elections, is confused about whether jailed individuals can vote, this suggests that those jailed individuals may be confused as to their own voting eligibility.

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42. *Id.* at 530 (omission in original) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973)).

43. 527 F. Supp. 1252 (S.D.W. Va. 1981).

44. *Id.* at 1316.

45. 589 F. Supp. 374 (S.D. Miss. 1984).

46. *Id.* at 382.

47. *Id.* at 381–82.

48. *See* Critchfield, *supra* note 1.

49. *Id.*

50. Jackson-Gleich & Yeary, *supra* note 17.

51. ERIKA WOOD & RACHEL BLOOM, AM. CIV. LIBERTIES UNION & BRENNAN CTR. FOR JUST., DE FACTO DISENFRANCHISEMENT 6 (2008), <https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> [<https://perma.cc/9WM9-V764>].

52. *Id.* Although this statistic refers to felons, the statistic suggests that county officials fail to understand voting qualifications for U.S. citizens involved in the criminal justice system. *See id.*

This uncertainty regarding the voting eligibility of people in jail, coupled with the fear of penalties for voting improperly, can encourage people in jail to err on the side of caution and refrain from voting. When Christian Nasse attempted to vote from his Arizona jail cell in 2020, an officer warned him that he could face punishments for voting improperly.<sup>53</sup> Nasse did not know if he was voting-eligible.<sup>54</sup> He could not search the internet or ask a poll worker to determine his eligibility. Rather, he had to take a chance: (1) either abstain from voting, or (2) cast a vote with no way to determine whether he was voting-eligible. If he abstained, he faced no legal penalties. If he voted and was not eligible, he could be criminally punished and sentenced to prison.<sup>55</sup> Nasse refrained from voting for fear of legal repercussions.<sup>56</sup> Ultimately, he was eligible to vote and would have faced no legal penalties for voting from jail.<sup>57</sup>

Even if people in jail know that they are voting-eligible, practical election processes also inhibit voting access.<sup>58</sup> Sheriffs acting in bad faith refuse to give jailed citizens voting information in a timely fashion, prevent third parties from providing registration documents, and retaliate against people in jail who express interest in registering to vote.<sup>59</sup> In 2020, the Arizona Coalition to End Jail-Based Disenfranchisement (the “Coalition”) mailed postcards to people detained in Arizona’s Apache County Jail.<sup>60</sup> These postcards stated, “BEING IN JAIL DOES NOT AFFECT YOUR RIGHT TO VOTE,” and they offered information regarding the process for jail-based voting.<sup>61</sup> The Coalition carefully ensured that the postcards complied with the jail’s mail regulations.<sup>62</sup> Days after the jailed citizens received the postcards, a guard demanded that the postcards be returned because the jail could not “ensure that the cards d[id] not contain contraband without

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53. See Madeleine Carlisle & Lissandra Villa, *Whether or Not You’re Able to Vote in Jail May Come Down to Where You’re Incarcerated*, TIME (Oct. 1, 2020, 8:19 PM), <https://time.com/5895219/voting-jail-2020-election/> [<https://perma.cc/NZZ5-9CH>].

54. See *id.*

55. In Arizona, a person who has a felony conviction does not legally have the right to vote. ARIZ. REV. STAT. ANN. § 13-904 (2021). Further, a person who knowingly votes in Arizona, despite not being voting-eligible, is guilty of a class 5 felony. See *id.* § 16-1016.

56. See *id.*

57. See *id.*

58. While there is little publicly available information regarding jail voting policies and practices, third-party interest groups have made such data available in Arizona. See generally, ARIZ. COAL. TO END JAIL-BASED DISENFRANCHISEMENT, UNLOCK THE VOTE ARIZONA: PROCEDURES FOR JAIL-BASED VOTING BY COUNTY JULY 2020 (2020), [https://foundation.azadvocacy.org/wp-content/uploads/2020/09/July\\_JBV\\_Report\\_1.pdf](https://foundation.azadvocacy.org/wp-content/uploads/2020/09/July_JBV_Report_1.pdf) [<https://perma.cc/8K2U-XVPN>]. This Part focuses on that available data.

59. See Carlisle & Villa, *supra* note 53.

60. Letter from The Ariz. Coal. to End Jail-Based Disenfranchisement et al. to Joseph Dedman, Sheriff, Apache Cnty. & Michael Cirivello, Commander, Apache Cnty. Jail 2 (Sept. 25, 2020), [https://campaignlegal.org/sites/default/files/2020-10/FINAL\\_Apache%20County%20Jail%20Voting%20Letter.pdf](https://campaignlegal.org/sites/default/files/2020-10/FINAL_Apache%20County%20Jail%20Voting%20Letter.pdf) [<https://perma.cc/4SLL-UPYC>] [hereinafter Letter to Dedman].

61. See Carlisle & Villa, *supra* note 53.

62. *Id.*

destroying the postcard.”<sup>63</sup> It is unclear how a postcard that complied with the jail’s mailing regulations could contain contraband. Because the officers re-collected the postcards in a matter of days, no people in the Apache County Jail registered to vote.<sup>64</sup>

People in jail likewise have limited access to materials required to vote. Election regulations often require that voters, especially first-time voters, provide a social security or driver’s license number before registering to vote.<sup>65</sup> Many states have voter identification laws that require particular forms of identification to register and vote.<sup>66</sup> Jails confiscate personal items after arrest, so eligible voters in jail may not have the required types of identification.<sup>67</sup>

The few jailed citizens who successfully register to vote regularly have no way of researching who or what they are voting for and cannot make informed decisions on Election Day.<sup>68</sup> Jails severely restrict access to television, newspapers, and the media.<sup>69</sup> A jail inmate who receives a ballot but has no way to research the candidates or initiatives cannot make an informed decision. Although some third parties provide nonpartisan guides regarding elections, the sheriff decides whether to distribute those guides.<sup>70</sup> For example, in the 2020 Arizona primary election, although the Coalition provided the Apache County Jail with free, neutral pamphlets regarding the election, the guards did not deliver the information to the jailed citizens, who felt uninformed and lacked access to sufficient information regarding the election.<sup>71</sup>

Jail practices also inhibit people from voting by mail. Take, for example, what happened when Yonas Kahsai attempted to vote from jail in 2018.<sup>72</sup> Unlike many voting-eligible jailed inmates, Kahsai, a former union organizer heavily involved in voter registration efforts, knew he was eligible to vote and requested an absentee ballot from his cell.<sup>73</sup> A guard promptly, and incorrectly, stated that Kahsai could not have one.<sup>74</sup> Nevertheless, Kahsai persisted, and the guard eventually granted his request.<sup>75</sup> Although the ballot arrived at the jail, Kahsai never received it because it was enclosed in a government-issued envelope so large that it violated the jail’s mail restrictions.<sup>76</sup> The government’s own failure to comply with the jail’s mail

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63. *Id.* (quoting Apache County Jail Commander Michael Cirivello).

64. *Id.*

65. Jackson-Gleich & Yeary, *supra* note 17.

66. *Id.*

67. *Id.*

68. See Letter to Dedman, *supra* note 60, at 2 (“[V]oters in the jail reported not having adequate information with which they could vote.”).

69. See, e.g., *Beard v. Banks*, 548 U.S. 521, 526 (2006).

70. See Letter to Dedman, *supra* note 60, at 2.

71. *Id.*

72. See Critchfield, *supra* note 1.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

restrictions prevented Kahsai, an eligible voter, from participating in the democratic process.<sup>77</sup>

Likewise, because guards often screen all incoming and outgoing mail, jailed inmates may fear that this screening will compromise their ballot secrecy.<sup>78</sup> In Contra Costa County, California, for example, jail staff may read all nonprivileged outgoing mail.<sup>79</sup> As evidentiary privilege does not protect ballots, jail staff can feasibly examine a jailed inmate's voting record.<sup>80</sup> Also, sheriffs—who oversee the jails—run in local elections, so fears of compromised ballot secrecy may produce concerns about retaliation.<sup>81</sup> When a person in jail knows that jail officials may likely see who the person voted for, that person is incentivized not to vote at all.

Importantly, political pressure often incentivizes sheriffs to enact policies that result in jail-based disenfranchisement. Many states delegate tremendous decision-making authority to local sheriffs to determine whether detained voters can access the franchise.<sup>82</sup> These sheriffs, who are often running for election themselves, determine whether to make voting materials accessible—or inaccessible—to voting-eligible detainees.<sup>83</sup> In one instance in Arizona, the sheriff refused to institute policies that would facilitate voting within county jails, even after the county recorder approved the policies.<sup>84</sup> Democratic Sheriff Paul Penzone, who refused to institute suggested changes, was up for reelection in a Republican district *and* responsible for facilitating jailed citizen voting during the election.<sup>85</sup> Political pollster Paul Bentz hypothesized that part of the reason why the sheriff did not facilitate jail-based voting was because it would not appeal to the Republican voter base in the district.<sup>86</sup> This system permits, and at times incentivizes, third-party interference with jail-based voting. Only seven people in jail voted in the March 2020 primary election in Arizona, even though an estimated 2700 people in jail were eligible to vote.<sup>87</sup> This represents a 0.26 percent rate of participation, which is 187 times less than the overall turnout rate for the election.<sup>88</sup>

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77. *Id.*

78. Jackson-Gleich & Yeary, *supra* note 17.

79. *See Send Mail to an Inmate*, CONTRA COSTA CNTY. OFF. OF THE SHERIFF, <https://www.cocosherriff.org/bureaus/custody-services/send-mail-to-an-inmate> [<https://perma.cc/AY24-BWZS>] (last visited Apr. 27, 2021) (select “Incoming Inmate Mail” and “Outgoing Inmate Mail”).

80. Jackson-Gleich & Yeary, *supra* note 17.

81. *Id.*

82. Kira Lerner, *Sheriffs Have A Lot of Power over Whether Hundreds of Thousands of People Can Vote*, THE APPEAL (Aug. 10, 2020), <https://theappeal.org/politicalreport/sheriffs-and-voting-rights-in-jail/> [<https://perma.cc/5FM3-RV3A>].

83. *See id.*

84. *See* Critchfield, *supra* note 1.

85. *Id.*

86. *Id.*

87. ARIZ. COAL. TO END JAIL-BASED DISENFRANCHISEMENT, *supra* note 58, at 4.

88. *Id.*



## III. VINDICATING VOTING RIGHTS

Although the causes may vary, the result is clear: many of the people in U.S. jails cannot vote. Despite the vague framework, it appears that some jail-based election policies today might be unconstitutional. Unlike in *O'Brien*, people in jail today are facially allowed to vote by mail in every state.<sup>89</sup> However, like in *O'Brien*, many people in jail may face an “onerous burden” when attempting to access the franchise.<sup>90</sup> As previously discussed, people in jail often do not know that they can vote, and voting improperly may result in criminal penalties that may encourage people in jail to err on the side of caution and abstain from casting a ballot.<sup>91</sup> Jail officials may refuse to distribute election-related information, people in jail often cannot research candidates to make an informed decision, mail policies may prevent jailed inmates from receiving their ballots, and screening policies and threatening guards may intimidate voters.<sup>92</sup>

It is unclear what exactly constitutes an onerous burden under the current judicial framework. However, it is clear that many people in jail do not vote.<sup>93</sup> Individually, not all modern voting practices may rise to the level of a constitutional injury. Failure to educate jail-based voters, for example, by itself may not violate the Constitution because it may not constitute an “onerous burden.” But a combination of the aforementioned policies may be unconstitutional if people in jail have no meaningful way to vote. Additionally, an onerous burden may arise if guards take affirmative actions to prevent people in jail from voting, as when a guard threatened Christian Nasse with criminal punishments or when guards laughed in Joe Watson’s face and incorrectly told him that he could not vote.<sup>94</sup> Likewise, jail policies or practices may violate the Constitution when they actively prevent jailed citizens from accessing election-related information or prevent third parties from communicating such information.

Determining whether a constitutional injury exists requires a fact-specific analysis to determine whether, under the totality of the circumstances, people in a specific jail cannot access the franchise.<sup>95</sup> This requires detailed investigations within individual jails. Such investigations are difficult to accomplish because interested parties must collect nonpublic jail data.<sup>96</sup> As in *O'Brien*, many people in jail are “not disabled from voting except by reason of not being able physically—in the very literal sense—to go to the polls on election day or to make the appropriate registration in advance by mail.”<sup>97</sup>

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89. See Asenso, *supra* note 9.

90. *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).

91. See *supra* notes 53–57.

92. See *supra* Part II.

93. See Critchfield, *supra* note 1.

94. See *id.*; see also Carlisle & Villa, *supra* note 53.

95. *O'Brien*, 414 U.S. at 528.

96. See Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 456 (2011).

97. *O'Brien*, 414 U.S. at 528.

A. *Private Plaintiffs Face Significant Impediments to Successful Litigation*

As previously discussed, many modern policies likely fail to provide people in jail with meaningful access to the franchise and potentially violate the Constitution. Yet, even if jailed citizens have meritorious claims that election policies violate the Constitution, numerous barriers prevent private plaintiffs from successfully challenging such policies in court.

One problem exists because actions contesting jail-based disenfranchisement generally must be brought by people in jail themselves.<sup>98</sup> But, those jailed inmates—who have standing—often lack resources required for successful litigation. For example, jailed individuals often do not possess the funds required to finance the enormous cost of litigating systemic, institutional abuses.<sup>99</sup> A majority of the 555,000 pretrial detainees are in jail because they cannot post bail.<sup>100</sup> Based on the most recently available data, the median amount of money bail in the United States is \$10,000.<sup>101</sup> It is unlikely that a jailed citizen, who is unable to post a \$10,000 bail, could afford an attorney and litigate jail policies that prevent jailed citizens from voting. Jailed inmates may litigate on their own, but these claims are procedurally quite difficult: two of the three jail-based disenfranchisement cases that reached the Supreme Court were decided on procedural grounds.<sup>102</sup> While some people in jail have tried litigating these claims pro se, lower courts have often dismissed such claims based on procedural errors.<sup>103</sup>

Also, people in jail, who are wholly reliant on institutions that house them, are deterred from pursuing such litigation for fear of retaliation.<sup>104</sup> Guard intimidation and fear may dissuade people in jail from litigating against the jail in which they reside.<sup>105</sup> Individuals in jail are careful not to upset the guards, on whom they rely for food and all of life's necessities.<sup>106</sup> Therefore,

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98. See generally Alex Beck, Note, “Do Not Pass Go, Do Not Collect \$200, Do Not Submit Your Absentee Ballot, Go Directly to Jail, and Lose Your Right to Vote”: *Why Traditional Standing Tests Insulate Voting-Rights Claims*, 85 U. CIN. L. REV. 529 (2017).

99. See S. REP. NO. 96-416, at 20 (1979); see also Paikowski, *supra* note 12, at 836–37.

100. Tara O’Neil Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/> [https://perma.cc/SQ5Q-4H7E].

101. BERNADETTE RABUY & DANIEL KOPF, PRISON POL’Y INITIATIVE, *DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME* 14 n.9 (2016) (“The only national data we are aware of is for felony defendants in 2009, which found that \$10,000 was the median money bail.”).

102. See generally *Goosby v. Osser*, 409 U.S. 512 (1973) (finding that the district court failed to convene a three-judge panel as required under 28 U.S.C. § 2284); *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802 (1969) (finding that the record failed to indicate sufficient facts establishing a constitutional violation and implying that the plaintiffs improperly pled their case).

103. See, e.g., *Long v. Pierce*, No. 14-cv-00244, 2016 WL 912685, at \*5 (S.D. Ind. Mar. 10, 2016) (dismissing a pro se plaintiff’s claim of jail-based disenfranchisement).

104. See S. REP. NO. 96-416, at 20.

105. See *id.*

106. See *id.*

it is unlikely that a person in jail would take on the huge expense—monetary and otherwise—of litigating jail-based disenfranchisement.<sup>107</sup> Based on these reasons, without any assistance, jailed individuals cannot be expected to seek redress for the systemic deprivation of their basic right to vote.

Third-party interest groups may attempt to challenge jail-based disenfranchisement, but such groups also face significant barriers to judicial relief. Because people in jail are statutorily allowed to vote absentee in all fifty states,<sup>108</sup> third parties must challenge the disenfranchising practices, not disenfranchising laws. This requires intensive fact-finding and investigations. However, jails are notoriously closed off, have little governmental oversight, and lack transparency.<sup>109</sup> Third-party interest groups do not have the authority to go into jails, interview detainees, and conduct investigations.<sup>110</sup> Even more, jail guards determine with whom people in jail can communicate. When guards prevent third-party organizations from informing detainees that they have the right to vote, how will those guards respond when those organizations try to obtain information to challenge unconstitutional disenfranchisement?

Private third-party plaintiffs lack the authority to conduct detailed investigations regarding whether jail policies actually disenfranchise people in jail. This capability is crucial to successfully challenge jail-based disenfranchisement. These private third parties likely do not have sufficient information to plausibly allege that a jail is violating the Constitution—not because the information does not exist, but because they have no way of accessing it.

*B. The Department of Justice Has the Authority and the Responsibility to Challenge Jail-Based Disenfranchisement*

Procedural barriers may hinder successful private litigation, but that does not mean that state and local policies can continue to unconstitutionally deny people in jail the right to vote. The federal government has the authority—and responsibility—to combat jail-based disenfranchisement. Although the federal government generally does not have jurisdiction within state and local jails,<sup>111</sup> in 1980 Congress enacted the Civil Rights of Institutionalized Persons Act<sup>112</sup> (CRIPA) and codified the U.S. attorney general’s authority to initiate legal action and correct severe patterns of abuse within U.S.

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107. *See id.*

108. *See* Kate Rabinowitz & Brittany Renee Mayes, *At Least 84% of American Voters Can Cast Ballots by Mail in the Fall*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/> [<https://perma.cc/K36G-EBDJ>].

109. *See* Geraghty & Velez, *supra* note 96, at 456.

110. *See generally id.*

111. ZHEN ZENG, BUREAU OF JUST. STAT, U.S. DEP’T. OF JUST., NCJ 253044, JAIL INMATES IN 2018, at 10 (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf> [<https://perma.cc/5WP4-LUQP>] (“A jail jurisdiction is a county (parish in Louisiana) or municipal government that administers one or more local jails and represents the entity responsible for managing jail facilities under its authority.”).

112. Pub. L. No. 96-247, 94 Stat. 352 (1980) (codified as amended at 42 U.S.C. § 1997).

institutions.<sup>113</sup> CRIPA's purpose was to "ensure[] that institutionalized citizens will be afforded the full measure of protections guaranteed them by the Constitution of the United States."<sup>114</sup> CRIPA explicitly includes jails and pretrial detention facilities within its scope.<sup>115</sup>

The DOJ Civil Rights Division's Special Litigation Section (the "Division") is responsible for CRIPA enforcement.<sup>116</sup> The Division can investigate "egregious or flagrant conditions which deprive [institutionalized] persons of any rights . . . secured or protected by the Constitution."<sup>117</sup> If the Division determines that a "pattern or practice" of constitutional violations exists at an identified jail or pretrial detention facility, the Division must send a letter of its findings to the facility specifying the minimal remedies that the facility must undertake to correct the deficient conditions.<sup>118</sup> The DOJ can negotiate with the facility regarding improving the deficient conditions, and often the parties may reach a settlement agreement.<sup>119</sup> If the facility refuses or fails to correct unconstitutional conditions, the DOJ can initiate a lawsuit to challenge those conditions in federal court.<sup>120</sup>

DOJ action is the most effective option to combat jail-based disenfranchisement. No other party has the authority to conduct meaningful investigations within such facilities. Because jail-based disenfranchisement cases are extremely fact-intensive, these investigations are fundamental to determine whether a constitutional injury exists. After these investigations are complete, the DOJ has real bargaining power and can engage in meaningful negotiations with underperforming facilities to institute significant changes. Importantly, rather than litigation itself, it is the DOJ's authority, coupled with the threat of litigation, that often compels jails to correct unconstitutional behaviors.<sup>121</sup> But if all else fails, the DOJ can use the information from its investigations and initiate a lawsuit.<sup>122</sup> If the DOJ does initiate a lawsuit, it may expect "that the agency will settle the case through a consent decree or through a settlement agreement."<sup>123</sup> No other party has comparable authority to correct unconstitutional deprivations within U.S. jails.

From 2000 to 2014, the DOJ completed 441 various CRIPA actions, including 50 investigations, regarding jails.<sup>124</sup> Based on these actions, the

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113. 42 U.S.C. § 1997a(a), 1997c.

114. S. REP. NO. 96-416, at 3 (1979).

115. 42 U.S.C. § 1997(1)(B)(ii)–(iii).

116. See U.S. Dep't of Just., Just. Manual § 8-2.261 (2018).

117. 42 U.S.C. § 1997(a).

118. U.S. Dep't of Just., *supra* note 116, § 8-2.261.

119. Darrell L. Ross, *Correctional Law Commentary: Assessing the Trends in the Application of the Civil Rights of Institutionalized Persons Act (CRIPA) in Prisons and Jails: 2000–2014*, 52 CRIM. L. BULL. 6 ART 7 (Winter 2016).

120. *Id.*

121. *Id.*

122. 42 U.S.C. § 1997a(a).

123. *Id.*

124. Ross, *supra* note 119.

most common CRIPA violations include administrative issues, inadequate mental health programs, excessive use of force, and failure to protect.<sup>125</sup> Clearly, the attorney general has used its CRIPA authority and obtained relief for claims of unconstitutional jail conditions. But such authority has never been used to challenge jail-based disenfranchisement.<sup>126</sup>

CRIPA empowers the attorney general to investigate *all* unconstitutional deprivations.<sup>127</sup> Jail election policies constitute “egregious” and “flagrant” conditions in a severe pattern of abuse by unconstitutionally inhibiting citizens from voting solely because those individuals reside in jails.<sup>128</sup> The Division should use its authority to conduct investigations and, depending on its findings, negotiate with deficient facilities or initiate lawsuits in federal court. This solution has never been proposed before, but it may be a possible solution to combat jail-based disenfranchisement.

The United States has a long legacy of voter suppression, particularly with regard to people of color. Since the Reconstruction Era, federal government intervention has been the primary driver of expanding the voting franchise, including significant involvement behind the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, and the Voting Rights Act of 1965. Despite efforts to expand the democratic process, state and local practices today continue to unconstitutionally disenfranchise large swaths of people. The federal government must use its authority to prohibit practices that result in unconstitutional disenfranchisement, particularly disenfranchisement that targets historically marginalized communities.

#### CONCLUSION

“A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm.”<sup>129</sup> A jailed citizen, a qualified voter, is no more nor no less so because he lives in a cell. A state cannot inhibit a would-be voter from casting a ballot merely because that voter is incarcerated in jail. States must provide reasonable access to the franchise for these voters, but many states have failed to do so. This is unacceptable, and the process cannot continue. Private litigation may not work to end jail-based disenfranchisement, but DOJ action, pursuant to CRIPA, is the most effective solution to challenge these unconstitutional practices and eliminate an aspect of structural racism within the criminal justice system.

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125. *See id.*

126. *See generally id.*

127. 42 U.S.C. § 1997a(a).

128. *Id.*; *see also supra* Part II.

129. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).